LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
AUG 10 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73 - 278

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT and APPENDICES

JOHN G. WAYMAN
WILLIAM D. ARMOUR
HARLEY N. TRICE II
REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania
Counsel for Petitioner,
Westinghouse Electric
Corporation

Of Counsel: DAVID L. TREZISE
RONALD G. INGHAM

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTE INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	16
APPENDIX "A"	17
APPENDIX "B"	44
APPENDIX "C"	45

TABLE OF CITATIONS

CASES

Diamond Shamrock Co., 181 NLRB 261, *enforcement den.*, 443 F.2d 52 (3rd Cir. 1971) ..8, 11, 13-15

GTE Lenkurt, Inc., 204 NLRB No. 75 (1973) 13

McDonnell Douglas Corporation, 194 NLRB No. 75, *remanded*, 472 F.2d 539 (8th Cir. 1973), *reversed*, 204 NLRB No. 156 (1973) 8, 11, 13, 15

NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) 9

Peyton Packing Co., 49 NLRB 828 (1943), *enforced*, 142 F.2d 1990 (5th Cir. 1944) *cert. den.*, 323 U.S. 730 (1944) 9

Republic Aviation Corp. v. NLRB, 324 U.S. 793 1945 9

STATUTE

National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 et seq.

Section 7 .....6, 10

Section 8(a)(1) 6

PREFACE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Westinghouse Electric Corporation, respectfully prays that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit, entered in this proceeding on June 7, 1973, wherein the Third Circuit affirmed the decision of the National Labor Relations Board which held Petitioner violated Section 8(a)(1) of the Act by maintaining and enforcing a no-access rule against off-duty employees.

OPINIONS BELOW

The decision of the trial examiner is set forth in its entirety in the decision of the National Labor Relations Board (the "Board") which is reported at 199 NLRB No. 101 (Appendix "A," *infra*, pp. 17-43). There was no formal opinion of the United States Court of Appeals for the Third Circuit; that court entered a judgment order on June 7, 1973, denying Petitioner's petition for review to set aside the Board's order and enforcing the order (Appendix "B," *infra*, p. 44).

JURISDICTION

The judgment order of the Court of Appeals was entered on June 7, 1973 (Appendix "B," *infra*, p. 44). The jurisdiction of this Court is invoked by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The questions presented for determination are:

1. Whether federal labor policy requires an employer to provide off-duty employees the identical forums as on-duty employees for union organizing activities even though the off-duty employee organizers have alternate means of communication available to them.

2. Whether a rule which is construed to permit off-duty employees access to an employer's premises for work related reasons is discriminatorily applied where it is enforced against off-duty employees seeking access for non-work related reasons including distribution of union literature.

STATUTE INVOLVED

This case involves the interpretation and application of Sections 7 and 8(a)(1) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151 *et seq.* (the "Act"). Those sections are printed in Appendix "C," *infra*, p. 45.

STATEMENT OF THE CASE

In addition to normal security measures at its Tampa, Florida plant, Petitioner secured the plant by placing a guard post on the sole access road, employing an independent security force twenty-four hours around the clock and promulgating and enforcing a no-access rule limiting access to its property. (R. 96-98a).[1] These measures, instituted simultaneously with commencement of operations at the plant in 1968, were introduced for production, safety and security reasons in connection with the manufacture by Petitioner of highly sophisticated generators and pressurizers for nuclear power plants. (R. 21a, 26a, 102-106a).

Petitioner's work force numbers approximately 800 employees, of which approximately 450 are hourly employees. Three shifts are manned by the hourly employees Monday through Friday, shift change hours being 7:30 A.M., 3:30 P.M. and 11:30 P.M. (R. 13a, 15-16a, 102a).

Petitioner's no-access rule, the validity of which is here in issue, is contained in the plant guard manual and provides in pertinent part:

> "If an Hourly or Non-Exempt Salaried Employee is scheduled to work overtime, he should have in his possession a salmon colored, IRREGULAR HOUR PASS (Westinghouse Form 23154 B), signed by his supervisor. The Security Guard will mark the time on the pass and allow the employee to enter. When the employee departs, the Security

---

1. All references to the appendix before the Court of Appeals are designated "R. . . . .a."

Guard will note the time out, initial the pass and hold in the Guard Station for the day shift Lieutenant who will forward the passes each morning to the Security Manager.

"If the Employee is reporting for work at a time other than his regular shift and for any reason does not have an Irregular Hour Pass, the guard shall properly identify the employee, log his entrance in the Daily Log, and insert a notation that there was no pass. The employee shall then be allowed to proceed to his work station. When employee departs, he should furnish an Irregular Hour Pass or he should be logged out.

"Other than for work duties, Hourly or Non-Exempt employees will not be admitted onto the property."

(R. 99a, Resp. Exh. 2)

As administered, Petitioner's no-access rule permitted employees on its property one-half hour prior to and after completion of their scheduled shift. (R. 15-16a, 63-64a, 158a). Additionally, the rule was not applied to bar access to the only unsecured portion of Petitioner's property, a 260 foot private access road to the plant which constitutes the sole and exclusive means of ingress and egress. (R. 32a, 110a, 117a, 158a).

Although engaging in organizational activities in secured areas of Petitioner's property during the times permitted as well as in the unsecured area at various times, two or three off-duty employees additionally obtained access to Petitioner's secured property at times other than those permitted by the rule, and engaged in distribution of union literature outside the main en-

trance to the manufacturing building. (R. 37-51a, 71a, 76a, 85a). The instant controversy over the validity of Petitioner's no-access rule arose out of Petitioner's enforcing its rule against these off-duty employees by asking them to leave the premises and by placing an informational memorandum in their personnel files after the third occurrence.

The trial examiner found that even if he assumed *arguendo* Petitioner's no-access rule were promulgated for legitimate business considerations he would nevertheless be required to find that the rule, both on its face and as construed and enforced, was an unlawful impediment to the exercise of employees' rights under Section 7 of the Act. (Appendix "A," *infra*, pp. 34-35). The trial examiner also expressly found it unnecessary to consider or decide whether alternate means of communication with the employees were available. (Appendix "A," *infra*, pp. 35-38).

In affirming the trial examiner's decision, the Board held Petitioner had violated Section 8(a)(1) of the Act by maintaining and enforcing its no-access rule so as to preclude off-duty employees from entering and distributing union literature on its plant property. Further, the Board agreed with the trial examiner that Petitioner had not furnished sufficient justification for so broad a prohibition as interpreted and applied in the context of this case. (Appendix "A," *infra*, pp. 17-18).

Upon Petitioner's petition for review and to set aside the decision and order of the Board, and the Board's cross petition for enforcement, the United States Court of Appeals for the Third Circuit affirmed without opinion. (Appendix "B," *infra*, p. 44).

The effect of the Third Circuit's decision is to force an employer's constitutionally protected property rights to yield to the statutory organizational rights of its employees without any showing that such an accommodation is necessary to protect the employees' rights.

REASONS FOR GRANTING THE WRIT

This case raises a vital question concerning the rights of off-duty employees to access to an employer's property for a non-work related reason. This question has not been, but should be, decided by this Court. The decision of the court below affirms without opinion the Board's order that an employer must permit off-duty employees access to plant property for reasons unrelated to their work, including distribution of union literature, even if such employees have alternative means of communication available to them.

Following its prior holdings in *McDonnell Douglas Corporation*, 194 NLRB No. 75, *remanded*, 472 F.2d 539 (8th Cir. 1973), and *Diamond Shamrock Co.*, 181 NLRB 261, *enforcement den.*, 443 F.2d 52 (3rd Cir. 1971), the Board in the instant case extended the principles governing protection of solicitation rights of on-duty employees to off-duty employees by adopting its trial examiner's conclusion that Petitioner's no-access rule was a presumptively invalid infringement upon its employees' organizational rights which Petitioner had failed to justify by any substantial showing of special circumstances requiring such rule for reasons of safety, production or discipline. Since an employer's right to control access to its property is not placed in issue where rights of on-duty employees already on the premises are involved, application of the presumption of invalidity does not require inquiry into availability of alternate means of communication, and therefore the trial examiner found it unnecessary to consider or decide whether alternate means of communication were available as Petitioner contended. (Appendix "A," *in-*

fra, pp. 35-38). By totally ignoring the legal distinction between on-duty and off-duty employees, the Board has not balanced or even considered the employer's constitutionally protected interest in controlling its property, and has therefore violated the mandate of this Court that it accomplish an accommodation between the competing interests of employer and employee "with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

It is well settled that an employer may not, absent special circumstances, prohibit on-duty employees on the premises from engaging in distribution of union literature during non-working time and in non-work areas. Any rule abridging or interfering with this right of employees is presumptively invalid unless such interference can be demonstrated to be essential for maintenance of the employer's interest in safety, production or discipline. *Peyton Packing Co.*, 29 NLRB 828 (1943), *enforced*, 142 F.2d 1990 (5th Cir. 1944), *cert. den.*, 323 U.S. 730 (1944); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).[2] However, it is equally well settled that non-employees are not entitled to enter an employer's premises for organizational purposes absent a showing that no other adequate avenues of communication exist with the employees. In *NLRB v. Babcock & Wilcox Co.*, *supra* at 112, the Court stated:

"Organization rights are granted to workers

---

2. The trial examiner found presumptively valid Petitioners' housekeeping rule which bars distribution of literature in work areas of the plant and Petitioners' no distribution - no solicition rule which proscribes such conduct during work time. Appendix "A," *infra*, pp. 26-27.

> by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessability of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."

Consequently, in view of the different competing interests to be accommodated, the "distinction between rules of law applicable to employees and those applicable to non-employees . . . is one of substance." *Id.* at 112.

Although this Court has not heretofore decided the precise status of an off-duty employee with respect to Section 7 rights, it is clear that the determination requires consideration of the employer's right to control ingress and egress to its property, a factor not in issue when an employee is on the employer's property pursuant to the work relationship. At the conclusion of an employee's shift, the status of such employee becomes analogous to that of a non-employee with respect to access to his employer's property, since an off-duty employee has no express legal right to return to the employer's premises unless the employer has granted him such a right. Because the Board saw no legal distinction between the status of off-duty employees seeking access to the employer's property and that of on-

duty employees, it never considered Petitioner's property interest in arriving at an accommodation of what it thought to be the competing interests involved.

The necessity for guidance from this Court is best demonstrated by conflicting recent decisions of the Courts of Appeal for the Third and Eighth Circuits and the Board which, in reviewing the accommodation of competing interests where rights of off-duty employees are involved, have had to consider the nature of the interests to be balanced. In *Diamond Shamrock, supra,* the Third Circuit held that the Board, in weighing the competing interests, had improperly failed to consider the employer's private property interest by applying the *Peyton Packing* presumption of invalidity to find unlawful a similar no-access rule. In denying enforcement of the Board's order, the court expressly relied upon what it found to be the "difference in the legal rights of on-duty employees and those of off-duty employees with respect to access to the secured areas of the plant. . . ." *Supra* at 58. However, in affirming without opinion the Board's order in the instant case, the Third Circuit has inexplicably obliterated this distinction by approving application of the *Peyton Packing* presumption to invalidate Petitioner's no-access rule. In *McDonnell Douglas, supra,* the Eighth Circuit refused enforcement of the Board's order invalidating a no-access rule by application of the *Peyton Packing* presumption, finding that the Board had failed to consider meaningfully the competing interests. Direct conflict with the decision below was avoided by the Eighth Circuit's remand to the Board. Although declining to define the proper interests to be balanced by the Board under the circumstances there presented, the court stated at p. 547.

"It is not our function to delineate the precise standards to be applied upon remand in balancing the interests of the parties. The Board in its expertise is more qualified to perform this function. We do suggest, however, that on remand the Board would be well advised to give consideration, *inter alia*, to (1) permitting distribution on the parking lots during the day shifts as distinguished from the night shifts; (2) whether there are other means of access or communication available to employees for distribution and solicitation such as entrances to the parking lots and to the avenues considered in *Diamond Shamrock* and *Rockwell Mfg. Co., supra;* and (3) the status of an employee as related to his §7 rights once he has left the premises.

"By way of addendum we emphasize our recognition of the distinction to be drawn between employees' and nonemployees' rights under §7. We have heeded the Supreme Court's admonition in this regard as enunciated in the *Republic-LeTourneau,* and the *Babcock-Wilcox* cases. What we find as we construe these cases is that in both instances the Board is to consider the balancing of interests of both parties. In this connection, we suggest that once the employee has left his employer's premises and returns to engage in union activity, he may have attained a status as to §7 rights somewhere between that of an employee and that of a non-employee. In other words, under those circumstances, are his privileges to contact fellow employees closer akin to the latter than the former?"

In a decision published July 17, 1973, the Board has suddenly repudiated its former position in *Diamond*

Shamrock and *McDonnell Douglas, supra,* by deciding the question framed by the Eighth Circuit opinion in the affirmative. The Board concludes in *GTE Lenkurt, Inc.,* 204 NLRB No. 75 (1973), that maintenance and enforcement of a no-access rule results in no significant diminution of employee rights, since the traditional right of employees to engage in organizational activities during non-work time when lawfully on the employer's premises is well protected by the courts and the Board. Without a persuasive showing of inability to communicate with employees by alternate means, the Board finds no basis for requiring employers' property rights to yield to the statutory rights of employees, and holds that a no-access rule barring off-duty employees from the employer's premises for any reason is presumptively valid absent a showing it has been discriminatorily applied against union activities or that no adequate alternate channels of communication are available. Finally, the Board, in footnote 9 to its decision, expressly overrules its prior decisions in *McDonnell Douglas*[3] and *Diamond Shamrock* to the extent they are inconsistent with this holding.

Thus, with the exception of the decision below, a distinction between the rights of off-duty employees and on-duty employees to utilize an employer's property has been recognized. The apparent conflict between these decisions as well as the nature of the interests

---

3. On remand, the Board avoided the issue of whether the employer's no-access rule was presumptively valid or invalid by deciding only that the employer had shown sufficient need for security to justify its rule. *McDonnell Douglas Corp.,* 204 NLRB No. 156, 1973.

affected make the question presented an important one which should be decided by this Court. Certainly the obvious failure to consider the need for requiring an employer's property rights to yield to employees' organizational rights compels reversal.

Moreover, since the trial examiner concluded that the facts of this case did not require application of the doctrine of alternate means of communication, there is no finding, and indeed no testimony, that alternate means of communication were not available. To the contrary, the trial examiner admitted that:

> "As to the facts, the record in this proceeding does reflect that during the current and prior organizing campaigns union representatives and employees did distribute literature along the access road from where it intersects Westshore Boulevard to a point within several feet of the guard shack. There is also evidence in the record that on three occasions . . . employees Thomas, Slane and Ackley handbilled employees on the respondent's premises during a one-half hour period after conclusion of their regular work shifts."
>
> (Appendix "A," *infra*, p. 36).

Petitioner's 260 foot private access road, made available to both employee and non-employee union organizers, is by its nature an extraordinarily effective channel of communication because it is the sole means of ingress and egress to Petitioner's property. Furthermore, uncontradicted testimony established that employee and non-employee organizers were never interfered with by Petitioner while handbilling at this location. (R. 118a). In *Diamond Shamrock*, the Third Circuit

found the *only* unsecured area, the employer's parking lot, to be an appropriate alternate channel of communication. Thus, additional areas of Petitioner's property should not be carved out for use by employees for non-work related purposes without persuasive evidence of the necessity for such an accommodation.

Petitioner's rule, as construed and applied, also permitted employees to utilize Petitioner's non-production areas for organizational activities for one-half hour prior to and upon completion of their shifts. In addition to the testimony in the record noted by the trial examiner establishing utilization by employees of Petitioner's property for organizational activities during the one-half hour period after conclusion of their shift (Appendix "A," *infra*, p. 36), there is further testimony showing other employees handbilled on Petitioner's property prior to commencement of their shift. (R. 63-64a). In *Diamond Shamrock, supra*, an identical one-half hour provision was found adequate, while a similar provision providing for such activities during a "reasonable time" before and after an employee's shift was upheld in *McDonnell Douglas, supra*.

Thus Petitioner's no-access rule works a reasonable accommodation between its constitutionally protected property rights and the statutory rights of its employees, and no further accommodation is warranted.

Finally, it is apparent that the trial examiner's determinations that Petitioner's no-access rule was broader than necessary and had not been justified were the underlying bases for his conclusion that the no-access rule was discriminatorily applied. The principal stated basis for the finding that Petitioner's no-access rule

had been discriminatorily applied was some evidence that the rule had not been enforced against off-duty employees seeking access to the property to visit the company nurse, to make purchases at the company store, to retrieve certain personal belongings, and to inquire about their insurance coverage. (Appendix "A," *infra*, p. 34). Non-discriminatory application of a no-access rule would thus appear to require an absolute bar of off-duty employees from their employer's premises, even for work-related reasons such as those described above, a position wholly unwarranted by the accommodation envisioned by the Act.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN G. WAYMAN
WILLIAM D. ARMOUR
HARLEY N. TRICE II
REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner,
Westinghouse Electric Corp.

Of Counsel:
DAVID L. TREZISE
RONALD G. INGHAM

APPENDIX "A"

199 NLRB No. 101

D—6599
Tampa, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WESTINGHOUSE ELECTRIC CORPORATION, TAMPA DIVISION and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO	Case 12—CA—5413

DECISION AND ORDER

On April 24, 1972, Trial Examiner Eugene George Goslee issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings, and conclusions, as modified below, and to adopt his recommended Order.

We agree with the Trial Examiner that Respondent violated Section 8(a)(1) by maintaining and enforcing a broad nonaccess rule so as to preclude off-duty employees from ever distributing union literature on any part of Respondent's property. We further agree

that Respondent has not furnished sufficient justification for so broad a prohibition, as interpreted and applied in the context of this case. However, as we stated in *McDonnell Douglas Corporation,* 194 NLRB No. 75, we do not intend our holding to be construed as precluding employers from adopting rules regulating the use of their property which in clear and unmistakable terms define the rights of employees and do not infringe on those rights to a greater extent than necessitated by legitimate employer interests in such matters as security, traffic, and littering. We therefore find it appropriate to clarify the Order in the light of these considerations.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Westinghouse Electric Corporation, Tampa Division, Tampa, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining and enforcing at its Tampa, Florida, plant its rule which totally prohibits its off-duty employees from entering or remaining on any portion of its premises for the purposes of distributing

---

1. Member Jenkins agrees, for reasons fully set forth by the Trial Examiner, that Respondent violated Sec. 8(a)(1) of the Act. He finds it unnecessary to further clarify such findings or speculate upon circumstances or rules not presently before the Board in this case. Similarly, he would adopt the Trial Examiner's recommended Order, an order limited to the unlawful conduct found herein.

union literature in the nonworking areas of the plant premises during their nonworking time.

(b) Promulgating, maintaining, and giving effect to any rules which limit its employees' rights to distribute literature on its premises during nonworking time in nonwork areas, unless the limitations imposed on such activities are clearly defined as to times and areas and are demonstrably necessary to maintain production, discipline, or security.

(c) Disciplining employees, warning them of the imposition of further discipline, or placing written reprimands in their personnel files because they have engaged in activities protected by Section 7 of the Act.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Expunge from the personnel records of employees Ronald W. Thomas, Richard E. Slane, and Gerald Ackley the written reprimands placed therein on January 24, 1972.

(b) Post at its plant at Tampa, Florida, copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for

---

2. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Region 12, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C., October 17, 1972.

EDWARD B. MILLER, Chairman
JOHN H. FANNING, Member
HOWARD JENKINS, JR., Member
[SEAL] NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT maintain or enforce at our Tampa, Florida, plant our rule which totally prohibits our off-duty employees from entering or remaining on any portion of the plant premises for the purpose of distributing union literature in nonworking areas of the plant during their nonworking hours.

WE WILL NOT promulgate, maintain, or give effect to any rules which limit our employees' right to distribute literature on our premises during nonworking time in nonwork areas, unless the limitations on such activities are clearly defined as to times and areas and are demonstrably necessary to maintain production, discipline, or security.

WE WILL NOT discipline our employees, warn them of the imposition of further discipline, or place written reprimands in their personnel files, because they have engaged in activities protected by Section 7 of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

Appendix "A."

WE WILL expunge from the personnel files of employees Ronald W. Thomas, Richard E. Slane, and Gerald Ackley the written reprimands placed therein on January 24, 1972.

WESTINGHOUSE ELECTRIC CORPORATION,
TAMPA DIVISION
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 706, Federal Office Building, 500 Zack Street, P.O. Box 3322, Tampa, Florida 33602, Telephone 813-228-7227.

Appendix "A."

TXD-272-72
Tampa, Fla.

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

WESTINGHOUSE ELECTRIC CORPORATION, TAMPA DIVISION and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO	Case No. 12-CA-5413

CHARLES DEAL, ESQ., of Tampa, Fla., for General Counsel.

RONALD G. INGHAM, ESQ., of Pittsburgh, Pa., for the Respondent.

FRANK E. HAMILTON, JR., ESQ., of Tampa, Fla., and GUY H. PERRY, International Representative, of West Palm Beach, Fla., for the Charging Union.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

EUGENE GEORGE GOSLEE, Trial Examiner: This case came on to be heard before me at Tampa, Florida, on March 15, 1972, on a complaint[1] issued by

---

1. The complaint in this case, as amended on March 2, 1972, is predicated on a charge filed on December 3, 1971, and served on the Respondent on the same date.

the General Counsel of the National Labor Relations Board and an answer filed by Westinghouse Electric Corporation, Tampa Division, hereinafter called the Respondent. The issues raised by the pleadings related to whether, or not the Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, by certain practices, acts and conduct hereinafter detailed. At the conclusion of the hearing all parties waived oral argument, but briefs have been received from the General Counsel, the Respondent and the Charging Union, and have been duly considered.

Upon the entire record in this proceeding, and from my observation of the testimony and demeanor of the witnesses, I hereby make the following:

Findings of Fact and Conclusions

I. *The Business of the Respondent*

The Respondent is a Pennsylvania corporation and maintains among others, a plant at Tampa, Florida, where it is engaged in the manufacture of nuclear steam generators. During its fiscal year 1971, the Respondent manufactured, sold and shipped products from its Tampa plant valued in excess of $50,000 to customers located outside the State of Florida. During the same fiscal year, the Respondent purchased goods and materials valued in excess of $50,000 from sources located outside the State of Florida. The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Appendix "A."

II. *The Labor Organization Involved*

The complaint also alleges, the answer admits, and I find that the International Brotherhood of Electrical Workers, AFL-CIO, hereinafter called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. *The Unfair Labor Practices Alleged*

The complaint alleges that at all times material to this case the Respondent has had in effect a "housekeeping" rule and a "non-access" rule, which the Respondent has maintained, interpreted and enforced to prohibit its off-duty employees from entering on to the Respondent's premises during their non-working time to solicit union support and to distribute union literature in non-work areas. As amended on March 2, 1972, the complaint further alleges that in January 1972, the Respondent issued written reprimands to certain of its off-duty employees because they had returned to the plant to distribute union literature. The General Counsel alleges that by the above described practices, acts and conduct, the Respondent violated Section 8(a)(1) of the Act.

By its answer the Respondent admits to most of the factual allegations of the complaint, but denies that it has committed any unfair labor practices.

There is little or no dispute over the factual issues of this case, and essentially no necessity for the resolution of credibility issues. The singular legal conclusion to be drawn from the facts is whether, either on their face, or as construed and applied, the Respondent's "housekeeping" and "non-access" rules, or either of

them interfere with, restrain or coerce its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

The Respondent's Tampa plant opened in March 1968, and, as related above, the primary operations of this plant are devoted to the manufacture of steam generator pressurizers for nuclear power plants. The plant and surrounding premises occupy an area of about 250,000 square feet, and access to the premises is via a private entrance road, which is located off a public street, which will hereinafter be referred to as Westshore Boulevard.

The Respondent's operations are conducted on a 5-day work week, with three shifts during each 24 hour period. A total of about 800 employees are employed at the Tampa plant, of which about 450 are hourly rated employees and approximately equally divided among the three shifts. The record reflects that the Respondent's employment rules require hourly rated employees to be present at their work stations when their shift begins, and to remain at their work stations until the shift ends.

The Respondent admits that at all times since the opening of the Tampa plant in 1968, it has maintained the "housekeeping" rule in effect. The rule is published and is distributed to the Respondent's employees through an employee handbook, which is entitled, "You and Your Job at Westinghouse." The rule recites:

> HOUSEKEEPING
>
> To keep the Division and property orderly, clean and free of litter, non-employees are not permitted to distribute advertising material, handbills,

printed or written material of any kind on Westinghouse property. Likewise, in the interest of maintaining an attractive and litter free plant, employees are not permitted to distribute any such materials in working areas of the Division.

The General Counsel concedes that the second part of the "housekeeping" rule is a presumptively valid non-distribution rule.[2] He appears to contend, however, that the forepart of the rule, on its face applicable only to non-employees, has in fact been construed to prohibit off-duty employees from entering on the premises for purposes of distributing union literature. For the reasons related below, I find the General Counsel's contention unmeritorious.

Robert J. Johnson, the Respondent's Employee Relations Manager, testified as a witness for the General Counsel pursuant to the provisions of Section 43(b) of the Federal Rules of Civil Procedure. Johnson's testimony, which is uncontradicted, reveals that the forepart of the "housekeeping" rule is applicable only to non-employees, and has no applicability to the Respondent's employees, whether on duty or off duty. There is no evidence in this record, moreover, that the "housekeeping" rule, or any part of it, has been enforced, construed or applied contrary to its literal and valid language. Accordingly, I find that the Respondent's "housekeeping" rule is in all respects, including its pro-

---

2. The General Counsel also concedes that the Respondent's "no solicitation—no distribution" rule recited at page F-5 of its employee handbook, is presumptively valid, and not contended in this case to be violative of the Act.

hibition on distribution by non-employees,[3] a valid no-distribution rule. The General Counsel concedes this much is his brief, and I will recommend that this allegation be dismissed.

The Respondent's "non-access" rule has also been in effect since the date the Tampa plant opened, but unlike the "housekeeping" provision, it has not been made known to the employees through publication in the employees handbook. The "non-access" rule is published by the Respondent only in its guard manual, and is distributed only to the eight individuals who comprise its contract guard force. Insofar as this record reflects, the "non-access" rule was generally unknown to the Respondent's employees, at least until after the events upon which the complaint here is predicated had transpired. The "non-access" rule provides in pertinent part as follows:

> EMPLOYEE ACCESS
>
> The GREEN (or tan) photo background on the Employee Identification Card designates an HOURLY or NON-EXEMPT SALARIED EMPLOYEE. This employee is permitted access to his work area during his regular shift hours or when authorized by his supervisor to work overtime.
>
> If an Hourly or Non-Exempt Salaried Employee is scheduled to work overtime, he should have in his possession a salmon colored, IRREGULAR HOUR PASS (Westinghouse Form 23154 B), signed by his supervisor. The Security Guard will mark the time on the pass and allow the employee to en-

---

3. *N.L.R.B. v. Babcock & Wilcox Company*, 351 U.S. 105.

ter. When the employee departs, the Security Guard will note the time out, initial the pass and hold in the Guard Station for the day shift Lieutenant who will forward the passes each morning to the Security Manager.

If the employee is reporting for work at a time other than his regular shift and for any reason does not have an Irregular Hour Pass, the guard shall properly identify the employee, log his entrance in the Daily Log, and insert a notation that there was no pass. The employee shall then be allowed to proceed to his work station. When employee departs, he should furnish an Irregular Hour Pass or he should be logged out.

Other than for work duties, Hourly or Non-Exempt employees will not be admited onto the property.

A literal reading of the Respondent's "non-access" rule requires the construction that it prohibits hourly-rated employees from entering or remaining on Company premises for any reason other than the performance of their regular duties. The necessity for this construction is advanced by the testimony of Employee Relations Manager Johnson, who related that the Respondent has construed the "non-access" rule to prohibit any hourly-rated employee, without an irregular hour pass, from entering on the premises more than one-half hour before the beginning of his shift, and similarly prohibits any hourly-rated employee, without an irregular hour pass, from remaining on the premises more than one-half hour after the conclusion of his shift. As Johnson admitted, both on its face and as con-

strued and applied the "non-access" rule precludes off-duty employees from entering or remaining on Company property, including non-work areas, for the purpose of distributing union literature. The record further reflects that on three occasions during December, 1971, and January, 1972, the Respondent enforced its "non-access" rule to prohibit certain of its off-duty employees from distributing union literature in non-work areas on its premises. When the employees persisted in this conduct, they were given written reprimands, and warned that any continuation of the conduct could result in the imposition of further discipline.

According to a composite of the testimony of employees Ronald W. Thomas, Richard E. Slane and Gerald Ackley, all of whom are employed as maintenance servicemen on the Respondent's 3:30 to 11:30 p.m. shift, they were directed to leave the Respondent's property on each of the three occasions when they attempted to distribute literature on behalf of the Union to employees leaving the plant at the end of the third shift, as well as to employees entering the plant for the first shift.

On December 3, 1971, employees Thomas and Slane entered the Company premises about 6:45 a.m., and stationed themselves at a walkway 15 to 20 feet from the main entrance to the factory building. At this location Thomas and Slane passed out union handbills to employees entering the plant for the first shift. About 6:50 a.m. the employees were approached by John Goff, the Respondent's Plant Operations Manager for the third shift. Goff told the employees that they were within their rights to distribute the handbills, but asked them to please move back because they were creating congestion. Thomas and Slane complied, moved back,

and continued to pass out handbills. Within a few minutes Willard Staples, the Respondent's Manager for Security and Employee Services, approached and asked Thomas and Slane, "What have we here?" Staples picked up the package of handbills, looked at them, and asked the employees to follow him.

Inside Staples' office he expressed surprise at the employees conduct, and stated that he thought Thomas and Slane knew they couldn't pass out literature on Company premises. Thomas and Slane expressed the belief that the rule only applied inside the plant, but Staples assured them that the rule applied anywhere on Westinghouse premises. Staples added that he intended to take the handbills and destroy them. Slane argued that the handbills were his property, and Staples relented to the extent he kept only two copies and returned the remainder to the employees. Staples told Thomas and Slane to leave the premises and destroy the handbills. The employees complied, left the premises, and then handbilled at a location adjacent to the intersection of Westshore Boulevard and the access road leading to the Respondent's plant.

On December 10, 1971, Thomas and Slane, accompanied by employee Gerald Ackley, again entered the Respondent's premises about 6:45 a.m. On this occasion the employees were stopped by a guard, who inquired the reason for their entering the plant during their off-duty hours. Thomas told the guard that they were going in to pass out literature, and the guard allowed them to proceed. The employees stationed themselves at the same location as on December 3. Within a few minutes the guard approached and told the employees that because they did not have an overtime pass,

he had been instructed by management to tell them to leave the premises. The employees left, and again passed out their literature at the intersection of Westshore Boulevard and the access road.

Thomas, Slane and Ackley again attempted to handbill at the entrance to the main plant on January 24, 1972. Within a few minutes Goff approached and asked the employees, "What, you here again?" Goff pointed to the gate, and said, "I'm sure you don't have an overtime pass. OUT!" The employees complied, and resumed their handbilling at the intersection of Westshore Boulevard and the access road.

At the beginning of their regular shift on the afternoon of January 24, Thomas, Slane and Ackley were told that the Respondent's Manager for Hourly and Salaried Employee Relations, William T. McLean, wanted to see them. The employees met with McLean and Works Engineer Richards in a small conference room. McLean informed the employees that they had been told repeatedly on two or three occasions to leave the Company property, but that the employees kept coming back. McLean added that the purpose of the meeting was to inform the employees that a written reprimand would be placed in their personnel files, and if they returned to Company property again, further disciplinary action would be taken. Thomas stated that the employees believed that they were within their legal rights in distributing union literature on Company premises, to which McLean replied, "That's where we differ." The employees asked to see copies of the written reprimand to be placed in their files, and copies were furnished to them several days later. A week or so after the reprimands to Thomas, Slane and Ackley, the Respondent

held work area meetings, at which the employees were told that in accordance with the Respondent's long standing policy they were prohibited from being on the premises more than one-half hour before or after their regular shift, unless they had an overtime pass.

It is the Respondent's contention that its "non-access" rule was promulgated and has been enforced as a means of protecting the Company with respect to security and insurance liability, as well as a means of encouraging adequate production. Although the "non-access" rule has been in effect since the Tampa plant opened in 1968, Employee Relations Manager Johnson testified to a number of incidents of theft or damage to Company property and the property of its employees. Johnson also testified to the necessity of protecting the Respondent's records, its computer and its confidential product designs, as well as the desirability of protecting the Company against workmen's compensation claims arising as a result of the injury of employees on the premises.

The evidence in support of the Respondent's contentions with respect to the reasons for the creation and enforcement of the "non-access" rule is not at all persuasive. Insofar as the whole of the relevant evidence in this record reflects, the "non-access" rule has been ignored by the Respondent for all purposes other than prohibiting its off-duty employees from distributing union literature on non-work portions of its premises.

The "non-access" rule on its face is applicable only to hourly rated and non-exempt employees, and has no applicability to the many other employees on the Respondent's payroll who are salaried and exempt under the provisions of the wage and hour laws. It is clear

that the "non-access" rule has never been published for the benefit of the employees knowledge, and, contrary to the Respondent's contention, the existence of the rule and its applicability were generally unknown to the hourly rated employees until after the occurrence of the incidents which gave rise to this complaint. There is, moreover, a plentitude of evidence in this record to support the conclusion that the Respondent has generally ignored the enforcement on the "non-access" rule for most all work and non-work related purposes, but has rigidly enforced the rule to bar its premises to the distribution of union literature. The uncontradicted testimony of the employees who testified in this proceeding reflects that, except for overtime on weekends when regular shifts are not scheduled they have been allowed without benefit of any overtime pass to both enter and remain on Company premises for overtime work. Similarly, the uncontroverted testimony of the employees reveals that they have been allowed on the Company premises during non-working time for non-work related reasons, such as visiting the nurse, inquiring about insurance, and making purchases at the Company store. On such occasions the employees were not required to have an irregular hour pass, and they were not warned or reprimanded for violating the "non-access" rule. In the light of all this evidence I cannot accept the Respondent's assertion that its "non-access" rule is a universally applicable rule of employment designed and enforced to protect the Company solely against the eventualities which can ensue from trespass, theft and its legal and insurance liabilities.

Even if I were to assume *arguendo,* that the Respondent's "non-access" rule was promulgated and

maintained for legitimate business considerations, I would still be required to find that the rule, both on its face and as construed and enforced, is an unlawful and unreasonable impediment to the exercise by the Respondent's employees of the rights guaranteed them by Section 7 of the Act.[4] In the absence of evidence of special circumstances necessitating the rule to maintain production or discipline, a burden which the Respondent has not met in this record the "non-access" rule is discriminatory and unlawful.[5]

In its brief the Respondent acknowledges the general rule promulgated by the Board in *Peyton Packing Company,*[6] and approved by the Supreme Court in *Republic Aviation, supra.* The Respondent argues, nevertheless, that *Peyton* and *Republic Aviation* dealt with employees who were at the employer's premises pursuant to work obligations, and that the thrust of those decisions was directed to employees' rights within the parameter of their workday. Because this case involves off-duty employees, as opposed to on-duty employees during non-work time, the Respondent asserts that a proper balancing of the interests of the employees and the employer requires that the doctrine of the "alternate means of communication" be applied. As factual support for this contention the Respondent relies on some evidence in the record which it argues supports a finding that both unions and employees have had adequate opportunities for solicitation and distribution on Westinghouse premises. As to legal precedent in sup-

---

4. *Republic Aviation Corporation v. N.L.R.B.,* 324 U.S. 739.

5. *Republic Aviation, supra.*

6. *Peyton Packing Company, Inc.,* 49 NLRB 843.

port of its argument for application of the doctrine of the "alternate means of communication," the Respondent relies on the Decisions of the United States Supreme Court in *N.L.R.B. v. Babcock & Wilcox Company*[7] and *N.L.R.B. v. United Steelworkers of America*,[8] as well as the decision of the Third Circuit Court of Appeals in *Diamond Shamrock Co. v. N.L.R.B.*[9]

As to the facts, the record in this proceeding does reflect that during the current and prior organizing campaigns union representatives and employees did distribute literature along the access road from where it intersects with Westshore Boulevard to a point within several feet of the guard shack. There is also evidence in the record that on three occasions commensurate with the incidents of this case, employees Thomas, Slane and Ackley handbilled employees on the Respondent's premises during a one-half hour period after the conclusion of their regular work shifts.

On the basis of this evidence I find little merit in the Respondent's contention that its employees have had, or can have, adequate opportunity to engage in organizational activities on the non-work areas of its property. Whatever leeway the Respondent has allowed in the enforcement of the "non-access" rule, the rule on its face prohibits off-duty employees from entering or remaining on the whole of its property for any reason unrelated to their regular duties. There is nothing in the rule to put the employees on notice that they are permitted to distribute union literature on the access road,

---

7. 351 U.S. 105.

8. 357 U.S. 357.

9. 443 F. 2d 52 (C.A. 3).

and the rule is equally silent on like conduct during the one-half hour periods preceding and following the employees' regular shifts.

Nor do I find great merit in the Respondent's reliance on the decisions of the Supreme Court in the *Babcock & Wilcox* and *United Steelworkers* cases. It is granted that in both cases the Supreme Court expressed its concern for the necessity to balance the rights of workers to organize against the rights of the employer to protect and utilize his property. In *Babcock & Wilcox* the Court applied the test of the availability of alternate means of communication in determining whether an employer was obligated to open up his premises to allow distribution of union literature by nonemployee union organizers. In the *United Steelworkers* case the Court applied the same test in determining whether the enforcement against employees of a presumptively valid no-distribution rule was nevertheless discriminatory because the employer violated his own rule in the course of conducting an anti-union campaign. The facts of *Babcock & Wilcox* and the *United Steelworkers* cases are not the facts of this case. At issue here is a total prohibition against off-duty employees to enter any portion of the Respondent's premises for purposes of union solicitation or distribution. This case does not concern the rights of nonemployee union organizers, does not concern the enforcement of a presumptively valid no-distribution rule, and, in my view, does not require application of the doctrine of the "alternate means of communication."[10]

---

10. *Diamond Shamrock Co.*, 181 NLRB 261, enft. denied 443 F. 2d 52 (C.A. 3).

As to the Respondent's reliance on the decision of the Third Circuit Court of Appeals in *Diamond Shamrock Co., supra,* even if I were obligated to be bound by the Court's decision, rather than the decision of the Board, I would find the *rationale* of that case inapplicable to the facts before me in the instant proceeding. Unlike the Respondent's "no access" rule, the no-solicitation rule in *Diamond Shamrock* was applicable only to production areas and certain secured nonproduction areas, thus leaving the employees free to solicit during non-working time on all other non-work portions of the employer's premises.

In summary, I find and conclude that by maintaining and enforcing its "non-access" rule to prohibit its off-duty employees from entering or remaining on the Company's premises for the purposes of distributing union literature during non-working time in non-working areas, the Respondent has violated, and is violating, Section 8(a)(1) of the Act.[11] In arriving at this disposition of the issue before me, I have considered the evidence that Respondent has allowed the distribution of union literature at some times and at some places on its premises. I have also considered the absence of evidence in the record that employees have ever requested, or that the Respondent has ever denied permission to them to enter its premises for the purpose of distributing union literature. I find both considerations immaterial.[12]

---

11. *McDonnell Douglas Corporation,* 194 NLRB No. 75; *Cone Mills Corporation, White Oak Plant,* 174 NLRB 1015; and *Bauer Aluminum Company,* 152 NLRB 1360.

12. *Diamond Shamrock Co., supra,* and *Bauer Aluminum Company, supra.*

I also find and conclude that by reprimanding its employees for distributing union literature on its premises, by warning them that any repetition of this conduct would result in the imposition of further discipline, and by placing written reprimands[13] in the employees' personnel files, the Respondent engaged in additional violations of Section 8(a)(1) of the Act.[14]

IV. *The Effect of the Unfair Labor Practices Upon Commerce*

The activities of the Respondent set forth in Section III above, occurring in connection with its operations described in Section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the foregoing findings and conclusions, I hereby make the following:

V. *Conclusions of Law*

1. The Respondent, Westinghouse Electric Corporation, Tampa Division, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

---

13. I find no merit in the Respondent's assertion that the memorandums placed in the files of employees Thomas, Slane and Ackley were for information purposes only, and not for purposes of reprimand.

14. *Bauer Aluminum Company, supra.*

3. By maintaining and enforcing a rule prohibiting its off-duty employees from entering or remaining on its premises for the purposes of distributing union literature in non-working areas during their non-working time, the Respondent has violated, and is violating Section 8(a)(1) of the Act.

4. By reprimanding its employees Ronald W. Thomas, Richard E. Slane and Gerald Ackley because they distributed union literature in non-working areas on its premises during their off-duty hours; by warning said employees that any repetition of such conduct would result in the imposition of further discipline; and by placing written reprimands in said employees personnel files, the Respondent violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

VI. *The Remedy*

Having found that the Respondent has engaged in, and is engaging in unfair labor practices I will recommend that it cease and desist therefrom and take certain affirmative actions to effectuate the policies of the Act.

Having found that the Respondent's "non-access" rule has been maintained and enforced in contravention of Section 8(a)(1) of the Act, I shall recommend that the Respondent cease and desist from maintaining and enforcing said rule to prevent its off-duty employees from entering or remaining on its premises during their non-working time for the purpose of distributing union

literature in non-working areas. Having also found that the Respondent violated Section 8(a)(1) of the Act by reprimanding its employees, warning them, and placing written reprimands in their personnel files because they engaged in conduct protected by Section 7 of the Act, I will further recommend that the Respondent expunge from the personnel files of employees Ronald W. Thomas, Richard E. Slane and Gerald Ackley the reprimands placed therein on January 24, 1972.

Upon the foregoing findings and conclusions, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[15]

ORDER

The Respondent, Westinghouse Electric Corporation, Tampa Division, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining and enforcing at its Tampa, Florida, plant any rule which prohibits its off-duty employees from entering or remaining on its premises for the purposes of distributing union literature in the non-working areas of the plant premises during their non-working time.

(b) Disciplining employees, warning them of the imposition of further discipline, or placing written

---

15. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

reprimands in their personnel files because they have engaged in activities protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Expunge from the personnel records of employees Ronald W. Thomas, Richard E. Slane and Gerald Ackley the written reprimands placed therein on January 24, 1972.

(b) Post at its plant at Tampa, Florida, copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by other material.

---

16. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 17, in writing, within 20 days from the receipt of this Decision what steps have been taken to comply herewith.[17]

3. It is further recommended that all other allegations of unfair labor practices in the complaint be dismissed.

Dated at Washington, D. C.

EUGENE GEORGE GOSLEE
Trial Examiner

---

17. In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-2003

WESTINGHOUSE ELECTRIC CORPORATION, TAMPA DIVISION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Argued June 5, 1973

Before SEITZ, *Chief Judge*, STALEY and HUNTER, *Circuit Judges*.

JUDGMENT ORDER

After considering petitioner's petition for review and the Board's application for enforcement of its order, it is

ORDERED AND ADJUDGED that the petitioner's petition for review and to set aside the Board's order is hereby denied, and the Board's order is hereby enforced. Costs taxed against petitioner.

By the Court,
SEITZ, Chief Judge

Attest:
THOMAS F. QUINN, Clerk

DATED: June 7, 1973

APPENDIX "C"

STATUTE INVOLVED

Section 7 of the National Labor Relations Act, as amended, 61 Stat. 519, 73 Stat. 519, 29 U.S.C. §151 *et seq.*, provides:

> "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 8(a) of the Act provides:

> "It shall be an unfair labor practice for an employer —
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

LIBRARY
SUPREME COURT, U. S.

No. 73-278

FILED
SEP 6 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-278

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. The Board held that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by maintaining a rule denying off-duty employees access to non-work areas of the company premises to distribute union literature, and by reprimanding three employees for engaging in such activity. The Board rested its holding on two independent grounds: (a) the rule was not promulgated for legitimate business reasons, and was selectively enforced only to restrict union activity; and (b) even if validly motivated and applied even-handedly, the rule constituted an unreasonable impediment to the exercise by the company's employees of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. 157 (Pet. App. 33-40). The Board ordered petitioner to cease and desist from maintaining

and enforcing the rule (Pet. App. 41). The court of appeals enforced the order (Pet. App. 44).

2. The petition principally challenges the second ground for the Board's decision. That is, petitioner contends (Pet. 8-14) that the access of off-duty employees to plant premises should be governed by the rules that apply to outside organizers,[1] rather than those that apply to on-duty employees. It is unnecessary, however, for the Court to resolve that question in this case, because the Board's order is sufficiently supported by another ground of decision—*i.e.*, that the rule was discriminatorily applied.[2]

3. The only issue, then, is whether substantial evidence supports the Board's finding, sustained by the court below, that the company's rule was invoked solely against the distribution of union literature.[3] Such an

---

[1] Outside organizers are entitled to access only upon a showing that alternative methods of communicating with the employees are inadequate. *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105. Cf. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793.

[2] Nor is a different conclusion required by the fact that, subsequent to the court's decision in this case, the Board held that a rule denying off-duty employees access to plant premises for any purpose is presumptively valid. *GTE Lenkurt, Inc.*, 204 NLRB No. 75. In *Lenkurt*, the Board emphasized (at pp. 2-3) that "[t]here is no evidence that off-duty employees have, in fact, been allowed on the premises for purposes other than union solicitation or distribution of union literature, and hence there is no indication [the rule] has been disparately applied."

[3] It is well settled that a valid rule against literature distribution or solicitation applied in a discriminatory manner is unlawful. See, *e.g.*, *Revere Camera Co.* v. *National Labor Relations Board*, 304 F. 2d 162, 165 (C.A. 7); *National Labor Relations Board* v. *Shepherd Laundries Co.*, 440 F. 2d 856, 857 (C.A. 5); *National Labor Relations Board* v. *J. W. Mortell Co.*, 440 F. 2d 455, 457 (C.A. 7).

evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, there is ample basis for the Board's finding.

The Board found that off-duty employees frequently entered company premises without possessing passes for such diverse non-work related purposes as visiting the nurse, inquiring about insurance, retrieving personal belongings, or shopping at the company store (Pet. App. 34; A. 18a-19a, 52a-53a, 77a-79a, 81a-82a, 86a-88a, 92a).[4] Indeed, on one occasion, two employees entered the plant to begin leafleting on behalf of the union[5] without any questions from the guard. Subsequently, the employees were assured that they were engaging in permissible activity by the plant superintendent, who did not examine the handbills. They were later evicted by the security manager after he ascertained the content of the leaflets (Pet. App. 30-31; A. 36a-38a, 40a-43a, 68a-69a, 73a, 133a-134a). On this evidence, the Board properly concluded that the " 'non-access' rule has been ignored by the [company] for all purposes other than prohibiting its off-duty employees from distributing union literature on non-work portions of its premises" (Pet. App. 33).

---

[4] "A." refers to the appendix to the briefs in the court below, a copy of which has been lodged with the Clerk.

[5] International Brotherhood of Electrical Workers, AFL-CIO.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1973.

DOJ-1973-08